MOHD YUSOF MOHAMAD

v.

ELECTROLUX HOME CENTERS SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
SULONG MATJERAIE JC
[CIVIL APPEAL NO: 11-14 OF 1998]
5 FEBRUARY 1999

CIVIL PROCEDURE: *Affidavits - Contents - Sufficiency - Whether satisfies O. 41 r. 5 of Rules of the High Court 1980 - Personal knowledge of deponent - Sources of information - Solicitor filing contentious affidavit in pending application - Legal Profession (Practice & Etiquette) Rules 1978, r. 28(c)*

CIVIL PROCEDURE: *Appeal - Absence of appellant and counsel - Appeal struck off - Application for reinstatement - Exercise of court's discretion - Importance of appearing at mention and hearing dates*

The appellant had filed an appeal at the High Court but on the mention date both parties were absent and the appeal was struck off. The appellant then filed a summons in chambers for reinstatement supported by an affidavit deposed by counsel for the appellant himself. The reason proffered by counsel for his absence was that the clerk who prepares his files had had an emergency at the material time and thus did not hand over the file for the appeal to him. Consequently, he was unaware of the mention date. Counsel further submitted that both parties were absent and that it was only on the mention date and not at the hearing.

The respondent questioned the sufficiency of the supporting affidavit, namely that the identities of the clerk and his family member who was allegedly ill, their relationship, and the nature and seriousness of the illness – were all not stated therein. That no medical certificate was produced; that it was the duty of counsel for the appellant to refer to his diary to be aware of the mention date; and that it was in evidence that counsel for the appellant had received a letter from the High Court stating the mention date of the appeal.

Held:

[1] The affidavit deposed by counsel for the appellant failed to meet the requirements of O. 41 r. 5 of the Rules of the High Court 1980. The matters deposed therein were not within the personal knowledge of counsel. The affidavit also did not state the sources of information and was therefore irregular and inadmissible. Furthermore, the affidavit did not identify the clerk or his family member who was allegedly ill, or establish their relationship and the nature and seriousness of the illness. Nor was there any medical certificate annexed to the affidavit.

[2] The practice of solicitors themselves filing contentious affidavits in pending applications is discouraged. Pursuant to r. 28(c) of the Legal Profession (Practice & Etiquette) Rules 1978, a solicitor should not appear in a matter in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact.

[3] A counsel who fails to appear on a mention date does so at his own peril and to the detriment of his client. Counsels should place equal importance on mention dates and hearing dates; they must appear on both occasions.

[Applications for adjournment and reinstatement refused.]

Case(s) referred to:
Abdul Halim Abdul Hanan & Ors v. Pengarah Penjara Taiping & Ors [1996] 4 MLJ 54 ***(refd)***
Dick v. Piller [1943] 1 All ER 627 ***(refd)***
Esa Sa'yon v. Woon Kim Poh & Anor [1996] 2 CLJ 885 ***(refd)***
Gan Kim Kiat Bros Reality Sdn Bhd v. Leang Ah Kan [1983] 1 CLJ 298 ***(refd)***
Gilbert v. Endean [1878] 9 Ch D 259 ***(refd)***
Jones v. SR Anthracite Collieries Ltd [1920] 124 LT 462 ***(refd)***
Laing v. Hollway & Anor (1878) 3 QBD 437 ***(refd)***
Lee Ah Tee v. Ong Tiow Pheng & Ors [1984] 1 CLJ 26 ***(refd)***
Million Group Credit Sdn Bhd v. Lee Shoo Khoon & Ors [1985] 1 CLJ 181 ***(refd)***
Wan Othman Datuk Wan Yusof v. Kewangan Utama (M) Bhd [1993] 2 CLJ 572 ***(refd)***

Legislation referred to:
Legal Profession (Practice and Etiquette) Rules 1978, r. 28(c)
Rules of the Court of Appeal 1994, O. 23 r. 3
Rules of the High Court 1980, O. 35 r. 1, O. 41 r. 5

Other source(s) referred to:
Mallal's Supreme Court Practice, 2nd edn, p 477

For the appellant - Terlok Singh; M/s Terlok Singh & Co
For the respondent - Shafikah Mohamed Shaari

Reported by Sherin Kunhibava

JUDGMENT

Sulong Matjeraie JC:

Brief Facts Of The Case

The appellant filed an appeal at the High Court, Johor Bahru. A mention date was fixed on 31 July 1998. On the said date the appellant and respondent failed to turn up resulting in the appeal being struck out.

Consequently the appellant filed an application by way of a summon-in-chambers seeking reinstatement (encl. 10). This was supported by an affidavit (encl. 9) deposed by the counsel himself, Mr. Terlok Singh a/l Gurmeet Singh.

The reasons offered for non appearance on 31 July 1998 could be found at paras 3 and 4 of (encl. 9) and are appended below for easy reference:

> 3. Ingin saya membawa perhatian pihak tuan berhubung tarikh sebutan yang telah ditetapkan oleh pihak Mahkamah pada 31hb Julai, 1998 melalui surat tuan bertarikh 14hb Julai, 1998 sepertimana yang dilampirkan dan ditanda sebagai "TS-1".
>
> 4. Saya juga ingin memaklumkan kepada pihak tuan bahwa pada tarikh sebutan diatas saya tidak menghadirkan diri di Mahkamah sepertimana sepatutnya atas sebab-sebab berikut:
>
> (a) Untuk maklumat pihak tuan bahwa urusan tarikh sebutan Mahkamah akan disediakan oleh kerani saya dan fail-fail akan diserahkan oleh beliau sehari sebelum tarikh tersebut.
>
> (b) Dalam perkara ini, pada 30hb Julai, 1998 lebih kurang jam 10:00 pagi beliau telah mendapat berita bahwa salah seorang daripada keluarga beliau mengalami masalah kesihatan *(sic)* dan dikehendaki pulang dengan SEGERA, dengan itu beliau tidak menyerahkan fail Rayuan Sibil No. 11-14-98 kepada saya.
>
> (c) Oleh kerana saya langsung tidak mengetahui tentang tarikh sebutan tersebut jadi saya tidak menghadirkan diri di Mahkamah pada 31 Julai, 1998.

As a result the appeal was struck off.

At the hearing in chambers, the learned counsel/deponent of the affidavit urged the court to reinstate the matter. His argument was based essentially on the affidavit that he had deposed.

In addition to the affidavit the learned counsel told the court that both parties did not appear and that it was not a hearing but only a mention date.

Further it was argued that the appellant would lose his right of appeal automatically without the case being heard at the High Court. This court is of the view that counsel who failed to appear on the mention date do so at their own peril and to the detriment of their client.

The respondent was represented by Puan Shafikah Mohd. Shaari who rigourously objected to the application for reinstatement and argued that if the appellant failed to appear either personally or through his counsel, the action may be struck off and quoted O. 35 r. 1 Rules of High Court 1980 as well

as O. 23 r. 3 of the Court of Appeal Rules 1994, which this court is of the view is applicable to appeals before the Court of Appeal and not in this instant case.

Learned counsel for the respondent questioned if the material particulars and evidence offered by the learned counsel for the appellant in his supporting affidavit was adequate and sufficient for the purpose of the trial judge to exercise his discretion to reinstate the case.

It was argued that para. 4(b) of the supporting affidavit failed to show in an explicit way as to the person who was alleged to be sick.

The learned counsel argued further that the clerk who was alleged to be responsible to produce the file on mention cases was not identified; neither was any information provided in the affidavit deposed by the counsel for the appellant as regards what was the relationship between the clerk and the person alleged to be unwell nor any material provided on the type of sickness suffered indicating whether it was critical or otherwise.

No medical certificate was ever produced by the appellant to support their argument that the person was really sick and such certificate was not exhibited or annexed to the affidavit.

To support her argument the case of *Esa bin Sa'yon v. Woon Kim Poh & Anor* [1996] 2 CLJ 885; [1995] 3 AMR 2524 was adduced and quoted an extract therefrom at p. 2529 lines 20-25 where Abdul Malik b. Hj. Ishak J said, "I have said elsewhere that affidavits play a crucial role in interlocutory proceedings and in every application in chambers as submissions and decisions are invariably based on them ... Special care should be paid while drafting affidavits."

Another point raised by learned counsel for the respondent was that para. 4(c) of the appellants affidavit deposed that he was not aware of the mention date was untenable as if indeed the clerk was away it would have been the responsibility and duty of the counsel to refer to his diary.

As such learned counsel for the respondent said the application to reinstate the case should be dismissed with costs.

Additional Material Facts

1. Letter From High Court Johor Bahru

The letter from High Court Johor Bahru dated 14 July 1998 was referred to at para. 3 of the affidavit (encl. 9) deposed by counsel of the appellant. The receipt of the letter has never been denied by the appellant. It was clearly stated in the said letter that the matter was to be heard (for mention) before High Court 3 on Friday 31 July 1998 at 10am. Both counsel were absent. The copy of the letter sent to the solicitors of the respondent was returned to this court with an endorsement "sudah pindah". They have moved office from Strait Trading Building to Jalan Bunus Enam, Kuala Lumpur. Nothing else need to be added here.

The fact that the letter from the High Court Johor Bahru dated 14 July 1998 was received by the counsel for the appellant meant that the counsel cannot say that he was not aware of the date of mention.

Counsel for the respondent rightly argued that all counsel have diaries which are "indispensable tools" of legal practice. It was the responsibility of the counsel to refer to his diary to check on cases for mention or for hearing.

The fact that receipt of the letter dated 14 July 1998 from High Court, Johor Bahru was never disputed by the counsel for the appellant it is the finding of this court that the counsel was aware of the mention date.

2. Mention Date On 31 July 1998

It cannot be over emphasised that counsel should place equal importance to mention date as well as at the date of hearing. Counsel must appear on both occasions.

It was stated by counsel for the appellant at para. 4 (a) of the affidavit (encl. 9) that the files for mention cases were handed to him by his clerk **one day before** the mention date.

Mention date being 31 July 1998 at 10am meant that files would have been handed over by 10am on 30 July 1998, ie, the time when the alleged clerk was supposed to have received the alleged news.

One day has been reckoned as consisting of 24 consecutive hours, see: *Laing v. Hollway & Anor* [1878] 3 QBD 437 – Court of Appeal, where Bramwell LJ decided at p. 441 that where nine days were saved in loading and discharging cargo and where the terms of a charterparty stated that demurrage, if any, at a rate of 20 shillings per hour, despatch money 10 shillings per hour. The question is by how much time is she sooner ready? The answer is in nine times twenty four hours.

Therefore using the facts given by the counsel for the appellant, by 10am on 30 July 1998 the file should have already been handed over to him by the relevant clerk.

3. Failure Of Counsel For Appellant To Attend On 23 December 1998 Before This Court And Non-compliance Of Practice Direction No. 5 Of 1989

Both counsel for the appellant (Mr. Terlok Singh) and respondent (Puan Shafikah) appeared before this court on 16 October 1998 and by agreement this case was fixed for hearing in chambers on 23 December 1998, two days before the Christmas Holidays. This court is not suggesting for a moment that counsel for the appellant is celebrating Christmas.

However when the date of hearing came, although counsel for the respondent took the trouble to fly in from Kuala Lumpur, appellant counsel was absent and was represented by Encik Hussin bin Othman who told this court that Mr. Terlok Singh was sick. No medical certificate was tendered to court.

Further even up to the date of hearing of this case ie, on 5 February 1999 no medical certificate was ever given to this court to certify that the appellant counsel was unable to appear before this court on 23 December 1998. The failure to send in to this court his *bona fide* medical certificate for record purposes is contrary to the Practice Direction No. 5 of 1989 from Hakim Besar Malaya dated 1 December 1989.

4. Affidavit Deposed By The Counsel

There are a number of matters that require further examination under this heading.

(a) Sufficiency Of Affidavit

Counsel for the respondent argued that the affidavit failed to specify who was sick. It also failed to identify the clerk ie, his or her name.

Further the relationship between the clerk and the person who was having problem with his health was never mentioned in the affidavit.

Apart from the above, the nature and or seriousness of the health condition of the person who was alleged to be sick was never revealed.

No medical certificate was produced either and as such this court could not determine the seriousness of the sickness of the patient as diagnosed by the medical officer.

Learned counsel for the respondent argued that an affidavit supporting any application must provide necessary information supported by exhibits including but not limited to only medical certificate.

Learned counsel for the appellant requested for further adjournment to enable him to file another affidavit. When requested for authority learned counsel was unable to furnish any to this court. This was objected to by learned counsel for the respondent because of the length of time already taken for this case and it was not making any headway. She also said she has to fly in from Kuala Lumpur and therefore objected to any further adjournment.

The adjournment of a matter such as in the instant case is wholly at the discretion of this court upon its view of the facts before it.

Clearly therefore by applying for another adjournment the counsel, by implication, admitted to the insufficiency of the affidavit that he has deposed.

This court has to decide if the additional evidence in the further affidavit would help the court materially or otherwise.

(b) Practice Of Solicitors Filing Affidavit And r. 28 Of Legal Profession (Practice And Etiquette) Rules 1978

Shankar J (as his Lordship was then) said in *Million Group Credit Sdn Bhd v. Lee Shoo Khoon & Ors* [1985] 1 CLJ 181; [1986] 1 MLJ 315 that the practice of solicitors themselves filing contentious affidavits in pending applications should be discouraged. The parties are litigants and it is they who should be giving evidence. Although r. 28(c) of the Legal Profession (Practice and Etiquette) Rules 1978 does not prevent an advocate & solicitor from swearing or affirming an affidavit as to formal or undisputed facts in matters in which he acts or appears, it clearly says that a solicitor should not appear as such in a matter in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact. This decision was followed by Kang Hwee Gee J in *Abdul Halim bin Abdul Hanan & Ors v. Pengarah Penjara Taiping & Ors* [1996] 4 MLJ 54 where his Lordship at p. 61 suggested that "having sworn the affidavit in support of his clients summons, in order not to run foul of r. 28, counsel should not have appeared in court and should have left the conduct of this case to another counsel." The affidavit deposed by the counsel herein is therefore irregular.

(c) Personal Knowledge On Matters Deposed

Even assuming that the affidavit in support is not irregular, the deponent would appear to have failed to meet the requirement of O. 41 r. 5 of the Rules of High Court 1980 (RHC).

Matters deposed do not appear to be within the personal knowledge of the deponent. An affidavit may contain only such facts as the deponent is able of his own knowledge to prove. He must have personal knowledge to prove the same.

Order 41 r. 5(2) RHC says:

> An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

Interlocutory proceedings are those proceedings which "do not decide the rights of the parties" per Cotton LJ in *Gilbert v. Endean* [1878] 9 Ch. D. 259 at p. 268. In such situations, it is necessary to state the sources of such information and that the deponent believes such information to be true.

An affidavit of information and belief, not stating the source of information or belief, is irregular, and therefore inadmissible as evidence, whether on an interlocutory or a final application, see *Mallal's Supreme Court Practice*, 2 edn at p. 477. See also the case of *Wan Othman bin Datuk Wan Yusof v. Kewangan Utama (M) Bhd* [1993] 2 CLJ 572, High Court.

The affidavit deposed by the counsel in this instant case not only failed to comply with the requirement of the Rules of High Court, it also failed to show who was sick, the name of the clerk, the relationship between the clerk and the sick person, the sickness, whether critical or otherwise, to render the necessity of the clerk to be absent from office, medical certificate from the Medical Officer.

Should the finding of this court be right, then in such an event, the affidavit at encl. 9 is inadmissible. Therefore the summon in chambers in encl. 10 has no "supporting facts" to rely on. The end result is therefore obvious.

The Law

If neither the appellant nor the respondent appear at the mention date the action may be struck off the hearing list. The court is empowered to order reinstatement on the application of the appellant. Any application for restoration or reinstatement should normally be granted readily by the court unless the absence of the plaintiff was either intentional or contumacious, per Peh Swee

Chin J, (as his Lordship was then) in *Gan Kim Kiat Bros Reality Sdn Bhd v. Leang Ah Kan* [1983] 1 CLJ 298; [1983] 1 MLJ 351 at p. 352.

The appellant, in the course of the hearing, had also applied for this case to be adjourned further to allow him to file another affidavit. The learned counsel failed to furnish any authority. This court ruled that such application is an unfortunate reflection of the inability of the affidavit filed (encl. 9) to comply with the requirements of O. 41 r. 5 Rules of High Court 1980. This court is of the view that there is no sufficient or adequate reason to grant the adjournment.

Whether or not a party is granted an adjournment is wholly in the discretion of the judge which, it was said in the case of *Dick v. Piller* [1943] 1 All ER 627(CA), he would exercise solely upon his view of the facts. Scott LJ said at p. 628 that *prima facie*, the discretion of the judge is unfettered. This decision was followed by our then Federal Court in *Lee Ah Tee v. Ong Tiow Pheng 7 Ors* [1984] 1 CLJ 26; [1984] 1 MLJ 107.

Lord Sterndale, MR said in *Jones v. SR Anthracite Collieries Ltd* [1920] 124 LT 462 that "The respondents say that any question of adjournment is a matter which is within the discretion of the county court judge. So it is, and this court would not interfere if it appeared to them that such discretion had been exercised in a way which showed that all necessary matters have been taken into consideration, although they might not agree with the judge's decision."

It is the view of this court therefore that any application for adjournment as well as application for reinstatement of an action after being struck out may be granted at the court's discretion. However, because of the reasons outlined above, this court declined to exercise its discretion.